

COVID-19 in Iceland: The Need for Constitutional Justification and Checks and Balances

Hafsteinn Dan Kristjánsson

2021-03-09T11:00:04

With Great Restrictions comes a Great Need for Constitutional Justification

At the beginning of this pandemic in Iceland, the sense of urgency, uncertainty, and necessity seemed to be front and centre. New and far-reaching restrictions were seen, at least by some, as ‘a necessary evil’ in order to protect us from a new and, in a sense, invisible threat. The learning curve for the government was also steep. According to our law, the government had a wide discretion to address this novel situation. Less than a year later, this is still true to a certain extent. However, whereas the necessity to act was predominant in the first stages of the pandemic, questions of constitutionality and legality are now moving to the forefront. As an example, Parliament passed a [law on the 4th of February 2021](#), after the original version of this post was written, amending the Infectious Diseases Act. The law entered into force the week after. Here I will focus on possible lessons to be learned from dealing with the pandemic up until that law entered into force. Some of the changes made by the law will be, though, mentioned.

All interferences with constitutionally protected human rights must be justified according to the [Icelandic Constitution](#). It follows from the principle of proportionality that the greater the restriction, the greater the justification needs to be. And it follows from the principle of legality that the greater the restriction, the clearer the law authorizing the restriction needs to be. Reasons concerning emergency and practical possibility for the government to deal with certain situations for the common good can be taken into account. Arguably, these reasons are weighty in judging the government’s first reaction to an unknown danger. However, living under restrictions on a grand scale is becoming an enduring feature of ordinary life. That reality makes the restrictions greater. And as time passes, reasons concerning emergency and practical possibility either weigh less or apply differently. After all, the longer the situation lasts, the government gains experience in dealing with the virus and has time to implement considered measures for the future.

The Era of Restrictions: A Series of Temporary Regulations

The restrictions in Iceland are mainly imposed by administrative instruments, which for simplicity’s sake will be called here regulations. The main rules have a legal basis

in the 1997 Infectious Diseases Act. They are laid down by the Minister of Health at the recommendation of the Chief Epidemiologist, who is a part of [the Directorate of Health](#). There are, at least, three features of the Icelandic approach that merit attention and can potentially cause problems.

Firstly, the restrictions are imposed by a series of temporary regulations. Each instrument is usually valid for a relatively short period of time, that is usually from a week to little over a month. This means that the government can respond quickly to changes in the situation. But, as will be explained in a moment, this may cause difficulties in bringing certain types of actions to court.

Secondly, as previously [noted](#), the main legal basis for the restrictions was not as clear as would be ideal. It gave the government a great deal of discretion. To the government's credit, the Infectious Diseases Act has now been amended. Among the aims of the amendment was to remedy this defect. Nonetheless, the main substantive rules for the past year were laid down with administrative instruments based on a legal basis with fuzzy boundaries. While open-ended and even vague laws can be beneficial to address certain types of situations, this tests the limits of the principle of legality. In this circumstance, the validity and the limits of the measures primarily depend on their adherence to other general principles, such as the principles of equality, proportionality and objective considerations. Some of these are constitutional principles.

Thirdly, regulations in Iceland are usually drafted in short and concise manner, there is no preamble and there are no explanatory notes accompanying them as is the case for legislation. This feature of regulations in general and the open-ended legal basis of the restrictions can make it difficult to assess whether a particular restriction satisfies the aforementioned principles. For example, it can be difficult to assess whether gyms are in the same situation as some types of sports that are treated differently or whether it goes further than necessary to ban most sport activity in light of their diverse nature. Admirably, the memorandum of the Chief Epidemiologist to the Minister of Health, where recommendations for restrictions are made, has been made accessible and press conferences have been held explaining the need for the measures. Nevertheless, the devil is in the detail. It can be a tall order for the public to assess the restrictions in light of the evaluative principles. So, even though the Icelandic government has generally done a good job in providing information about the state of affairs, the public is not in the same position as the government. The potential problem of information deficiency is exacerbated if the rules are ever-changing or the approaches are *ad hoc*.

Let's now consider why these features might be problematic and the lessons we might learn.

Checks and Balances I: Democratic Legitimacy

Perhaps the greatest strength of the Icelandic approach is relying on and, for the most part, following the advice of experts, namely the Chief Epidemiologist. A lot of the information the public receives is also from public officials (see more [here](#)).

However, the main regulations are enacted by the Minister of Health alone and she is not bound by the advice of the Chief Epidemiologist. It follows from the legal arrangements described above that Parliament did not play a pivotal role last year in laying down concrete legal rules. The involvement of Parliament, overall, was also less than one would have expected given the gravity of the situation. The democratic input and oversight seemed to be minimal.

The result? The executive branch is mainly responsible for deciding and administering rules that drastically interfere with people's lives and livelihoods. At the same time, the legislative branch did not appear to be a central player despite the fact that Iceland has a parliamentary system. For context, it should be mentioned that in Iceland there is not a strong tradition of ministers resigning or successful no-confidence votes in Parliament. While ministers are politically accountable in principle, it seems to be weak in practice.

Checks and Balances II: Access to Court

The restrictions, which were imposed by administrative instruments, interfered with various freedoms, including limiting or closing down the operation of some businesses. Some of the regulations allowed for the possibility of applying for an exemption. Decisions on exemptions are so-called administrative decisions according to Icelandic law. Some people might want to or might have wanted to challenge the restrictions imposed by the regulations or the administrative decisions taken on the basis of the regulations. It is impractical to describe the nuances of civil procedure in a short entry. Instead, I will attempt to highlight certain possible obstacles to challenging the administrative instruments and to enjoy effective access to judicial review in light of the fact that each instrument was in force for a relatively short period of time.

According to our [Constitution](#) and [law](#), it is not possible to get an injunction against an executive act. There are also certain limits to bringing claims about annulling regulations. They stem from the procedural requirements of genuine dispute and having a legitimate interest in the outcome of a case, as they have been interpreted in practice. The latter procedural requirement has also been interpreted as placing certain limits on bringing claims about the validity of a regulation or an administrative decision that is no longer in force. The starting point seems to be that if the administrative act no longer has legal effect, then a party does not have a legitimate interest in the outcome of a case concerning its annulment unless there are some special circumstances. Since the restrictions were imposed by series of regulations, which were in force for a relatively short period, it is virtually impossible to bring an annulment claim to court and get a judgment before the regulation runs its course. For most people, no administrative decision was taken concerning them and one should not have to violate the law in order to get judicial review of an administrative instrument in a criminal case. Even in those instances where administrative decisions were taken, such as concerning applications for exemptions, their legal effect lasted only for a relatively short period making it likely that claims concerning their annulment would be dismissed.

Now, it might be possible to bring a declaratory claim about the illegality or impermissibility of the administrative instruments. However, there have been some uncertainties concerning declaratory claims about the illegality of an act and a party still needs to demonstrate that he or she has a legitimate interest in the outcome of a case in light of the fact that the administrative instrument no longer has legal effect. This is most easily demonstrated by pointing to an interest in damages. For this reason, the most practical types of claims to bring are a tort claim or a declaratory claim about tort liability. These types of claims come with their own difficulties. Chief among them is proving loss for the first type of claim or making likely that a loss occurred for the latter type. In many cases, this will only be evident later. So, our hypothetical person is likely left to wait and see. Meanwhile, an instrument after an instrument is enacted that may affect the person's legal position, for example, by limiting the operation of the person's business. In other cases, the limitations do not mainly concern a person's financial interests.

The consequence is that there are certain difficulties in obtaining effective access to court and judicial review of the restrictions, at least in a time sensitive manner. Even though there are certain options, mainly in relation to claims concerning damages, it can be wondered whether it is effective enough to check the executive branch. So, even if the minimum requirements of access to court may be satisfied, this may still be a concern from the point of view of the rule of law, separation of powers and the value behind the human right of access to court, which is protected by both the Icelandic Constitution and the European Convention on Human Rights.

Considering the reality of the situation, there is a potential 'checks and balances gap' in practice. The executive branch does not seem to be adequately constrained or checked by the legislative or the adjudicative branch. In light of the interests at stake, it is vitally important to fill the gap.

Closing 'the Checks and Balances Gap'

Considering the aforementioned, here are some initial recommendations for the future:

1. Justifying the restrictions publicly is important in light of their significance for the public, the potential 'checks and balances gap' as well as the problem of information deficiency. It would be a good practice if the government would publicly justify their regulations by providing in some detail the rationale for each restriction in addition to having the relevant information available. This includes how the restrictions satisfy the requirements of the principles of legality, equality, proportionality and objective considerations. This might also include reasons why some activities are grouped together but others are treated differently. The same applies to the distribution of vaccine in this new era of vaccination.

This has several advantages: (a) it makes the government explicitly go through the principles before enacting the rules; (b) it makes it easier for the public to evaluate the instruments and form an opinion on them; (c) it makes it easier for review bodies to do their job; (d) it might make it easier for Parliament to hold the executive branch

accountable and to decide whether it should act; and (e) it may also strengthen political accountability in practice.

It should be noted that according to the amendment that Parliament made to the Infectious Diseases Act, the Minister of Health, as well as other Ministers, shall inform Parliament about the measures with a report every month if the restrictions last longer than two months. In an accompanying [opinion of the Welfare Committee of Parliament](#), the need for information from the executive branch is stressed.

2. Although it is difficult to foresee the variety of situations that may arise because of infectious diseases beforehand, once the government has some experiences of a particular disease, it is possible for the legislative branch to decide whether it should lay down a general framework. As previously mentioned, Parliament has now made certain amendments to the Infectious Diseases Act.

3. It is vital that review bodies are vigilant at times like these. There are reasons for the courts to seriously consider reasonable interpretations of procedural requirements that are sensitive to the interests at stake, the realities of the situation and the principled importance of getting a decision on the legality of an act that interferes with a human right or an important interest. The rule of law, checks and balances and access to court recommend an approach that moves beyond minimum guarantees. If procedural requirements are interpreted too strictly, that may have undesirable chilling effects on bringing cases to court.

